United States District Court
Southern District of Texas
ENTERED
January 25, 2016
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CIVIL ACTION NO. 2:12-CV-223
	§	
2005 PILATUS AIRCRAFT BEARING TAIL NO. N679PE	§	
	§	

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION

Pending before the Court is Plaintiff's Motion for Finding of Fugitive Disentitlement, pursuant to Title 28 U.S.C. § 2466, and/or Sanctions as to Pablo Zarate Juarez (Zarate), Premier International Holdings, Ltd., and Viza Construction, L.L.C. (Claimants).[1] D.E. 95. The United States of America (the Government) seized a 2005 Pilatus Aircraft and initiated a forfeiture action. D.E. 1. Claimants filed a claim for the aircraft (D.E. 3, 4) and allege that the Government failed to prove the elements of fugitive disentitlement required by § 2466. Claimants further contend that application of the statute would require Zarate to make an unconstitutional choice between surrendering valuable property and surrendering his rights under the Mexico-United States extradition treaty. D.E. 98, p. 3. On July 16, 2015, United States Magistrate Judge Jason B. Libby issued a Memorandum and Recommendation (M&R) (D.E. 99), recommending that the

[1] "Claimants" collectively refers to Zarate, Viza Construction, L.L.C., and Premier International Holdings, Ltd. On July 19, 2012, Zarate filed claims, individually and on behalf of Viza Construction, L.L.C. and Premier International Holdings, Ltd., to the property. D.E. 3, 4. Zarate is the director and principal shareholder of Viza Construction, L.L.C. and the registered agent of Premier International Holdings, Ltd. Zarate filed a Withdrawal of Claim regarding his individual claim to the property. D.E. 82. He also filed an Opposed Motion to Dismiss the Claim of Pablo Zarate Juarez. D.E. 83. Following a telephonic hearing on April 22, 2015, Magistrate Judge Libby deferred ruling on Zarate's motion to dismiss pending Zarate's participation in the discovery process. D.E. 96.

Government's Motion for Finding of Fugitive Disentitlement be granted. Claimants filed their objections (D.E. 100) which are set out and discussed below.

Claimants first object to the Magistrate Judge's finding that Zarate has remained in Mexico with the specific intent to avoid prosecution in this country. D.E. 100, p. 1. Claimants argue that under the law, "mere notice or knowledge of an outstanding warrant, coupled with a refusal to enter the United States, does not satisfy the statute." *Id.* at 5 (quoting *United States v. $6,976,934.65, Plus Interest Deposited into Royal Bank of Scotland Intern., Account No. 2029-56141070, Held in Name of Soulbury Ltd.*, 554 F.3d 123, 132 (D.C. Cir. 2009) and *United States v. Any & All Funds on Deposit in Account No. XXXXX-XXXXXXXX at HSBC Bank PLC, 55 Corp. St., Coventry, United Kingdom*, 87 F. Supp. 3d 163, 168 (D.D.C. 2015)). Claimants allege that the only evidence the Government has shown is that Zarate, a Mexican citizen, last departed the United States years before the grand jury returned the indictment against him. *Id.* at 6.

In *Any & All Funds on Deposit,* the claimant had never lived in the United States and had only visited the country once.[2] Zarate, on the other hand, is the director and principal shareholder of two businesses incorporated in the United States (D.E. 95, p. 10), and United States immigration records show that Zarate entered the United States from Mexico on approximately thirty occasions in 2010, fifty-two occasions in 2011, and twenty-one occasions in 2012 prior to his final departure in June.[3]

[2] *Any & All Funds on Deposit,* 87 F. Supp. 3d at 168.

[3] D.E. 95-2, p. 2.

Also, in *Any & All Funds on Deposit*, the government based its argument for a finding of fugitive disentitlement largely on the fact that the claimant moved to specially appear in the criminal case, contested her extradition, and moved for a stay in the pending civil forfeiture case.[4] The court noted that the claimant had a legal right to do all three, so applying the fugitive disentitlement statute would amount to applying it based solely on the attorney's filings in the criminal and civil proceedings. *Id.* Here, the Government argues that Zarate is a fugitive because (a) he has refused to return to the United States to submit to the jurisdiction of this Court, despite his knowledge of the warrant for his arrest; (b) he defied the Magistrate Judge's orders to appear for his deposition (D.E. 79, 95-5); and (c) he has failed to comply with discovery orders, all in an attempt to escape criminal prosecution. The Magistrate Judge found that Zarate failed to appear even when ordered to do so, and he "filed various motions to avoid discovery obligations despite warnings that failure to comply [might] result in severe sanctions." (D.E. 99, p. 6-7). Relying on case law, the Magistrate Judge found that Zarate's failure to meaningfully participate in a pending suit evidenced his intent to avoid criminal prosecution. *Id.* at 7.

This Court has previously addressed the issue of a claimant's intention to avoid criminal prosecution in *United States v. All Funds on Deposit at Old Mutual of Bermuda Ltd. Contract No. CX4011696 in Bermuda*, No. 2:13–CV–294, 2014 WL 4101215 (S.D. Tex. Aug. 18, 2014). In that case, Magistrate Judge Ellington thoroughly reviewed existing case law to determine whether the claimant deliberately avoided prosecution by

[4] *Any & All Funds on Deposit,* 87 F. Supp. 3d at 168.

remaining in Mexico, his country of residence.[5] Magistrate Judge Ellington found that the government had not met its burden because there was no evidence to indicate that the claimant regularly traveled to the United States prior to his indictment, and the government had not presented any other compelling evidence reflecting his intentions.[6]

Magistrate Judge Ellington discussed two cases in which courts had found that the government had satisfied its burden to show that the claimant intended to avoid criminal prosecution. In *Collazos,*[7] the Second Circuit found that the claimant intended to avoid prosecution where she "declined to appear at two depositions and correspondence between the parties indicated that she sought to avoid being deposed in the United States lest she be arrested on a pending criminal charge." In *United States v. $671,160.00*,[8] the Ninth Circuit found that the claimant intended to avoid prosecution, noting that the claimant's absence from the United States was in stark contrast to his extensive travel in the United States prior to the indictment, and that the claimant had been given multiple opportunities to personally appear to contest the application of the disentitlement statute but had declined to do so.

Magistrate Judge Ellington also discussed two cases in which courts had found that the government had not satisfied its burden. In *United States v. $6,976,934.65 Plus Interest,*[9] the court's decision turned on the fact that the claimant had voluntarily left the

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[5] *All Funds on Deposit at Old Mut. of Bermuda*, 2014 WL 4101215 at *6.

[6] *Id*. at *7.

[7] *Collazos v. United States*, 368 F.3d 190, 194 (2nd Cir. 2004).

[8] *United States v. $671,160.00 in U.S. Currency,* 30 F.3d 1051, 1055 (9th Cir. 2013).

[9] *United States v. $6,976,934.65 Plus Interest*, 554 F.3d at 132–33.

United States over ten years before the criminal indictment, and the only evidence the government had was a video in which the claimant indicated that he did not wish to return to the United States, regardless of any pending charges. In *United States v. Salti,*[10] the Sixth Circuit found that the government did not meet its burden where the claimant had offered sufficient evidence that his health was too poor to allow him to travel.

Here, immigration records show that Zarate, like the claimant in *United States v. $671,160.00,* frequently traveled between the United States and Mexico prior to June of 2012. Additionally, Zarate has forgone multiple opportunities to personally appear to contest the application of the fugitive disentitlement statute, and he has declined to appear for his deposition. Claimants' first objection to the Magistrate Judge's finding that Zarate remained in Mexico with the specific intent to avoid prosecution in this country is **OVERRULED.**

Claimants next object to the M&R because application of the fugitive disentitlement statute puts Zarate to an unconstitutional choice between surrendering his property and surrendering his rights under the Mexico–United States extradition treaty. D.E. 100, p. 7–8. Claimants rely on *Simmons v. United States*, 390 U.S. 377 (1968) to support their argument. D.E. 100, p. 8. In *Simmons,* the issue was whether a criminal defendant's testimony at a pretrial suppression hearing could be used against him at trial. *Simmons,* 390 U.S. at 382. In ruling that it could not, the Court recognized that allowing such a practice would force the defendant to choose between two fundamental rights: he could surrender his Fourth Amendment right by not testifying at the suppression hearing

[10] *United States v. Salti,* 579 F.3d 656, 665–66 (6th Cir. 2008).

or he could testify and surrender his Fifth Amendment right to remain silent. *Id.* at 389–94. The Court found it intolerable that one constitutional right should have to be surrendered in order to assert another.

Section 2466 has not been found to violate due process because the statute does not punitively deprive a person of the right to be heard in connection with a civil forfeiture.[11] Courts have observed that the fugitive from justice has, by his own actions, "waived his right to due process in the civil forfeiture proceeding."[12] Claimants' second objection is **OVERRULED.**

Claimants' third objection urges the Court to exercise its discretion not to dismiss their claims if the Court finds the fugitive disentitlement statute applicable. D.E. 100, p. 10–11. Claimants argue that dismissal would be unfair. Because the Government received prolonged stays, fairness requires that they receive a stay to accommodate their interest in recovering the seized plane and Zarate's Fifth Amendment right to remain silent. *Id.* Claimants further argue that the facts here do not warrant dismissal of the claims and the Government "has not shown that declining to disentitle claimants will cause it any prejudice." D.E. 100, p. 11.

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[11] *Collazos*, 368 F.3d at 205-206.

[12] *United States v. $45,940 in U.S. Currency,* 739 F.2d 792, 798 (2d Cir. 1984) (applying fugitive from justice doctrine and affirming judgment on pleadings in civil forfeiture action); and *United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane, Miami, Dade Cnty., Fla*., 868 F.2d 1214, 1217 (11th Cir. 1989) (noting that forfeiture was, by operation of the fugitive from justice doctrine, an uncontested action). *See also United States v. $129,374 in U.S. Currency*, 769 F.2d 583, 587-88 (9th Cir. 1985) (property owner who was fugitive from justice was precluded from contesting forfeiture).

The Magistrate Judge correctly stated, "Claimant is entitled to his Fifth Amendment right against self-incrimination, but the forfeiture action is not barred simply because of the possibility that [Zarate] will be disadvantaged by remaining silent. D.E. 99, p. 9 (citing *United States v. $250,000 in U.S. Currency*, 808 F.2d 895, 900-01 (1st Cir. 1987)). This case was filed on July 10, 2012. It has been pending a long time, and Zarate has not provided a time frame as to when he might participate in the civil action. Thus, this Court declines to exercise its discretion to allow the case to remain open. Claimants' third objection is **OVERRULED.**

Finally, Claimants urge the Court to stay the proceedings, pursuant to Title 18 U.S.C. § 981(g)(2), until the criminal case against Zarate is complete. D.E. 100, p. 11. The Court agrees with the Magistrate Judge's conclusion that Claimants are not entitled to a stay based on the facts before the Court. This objection is **OVERRULED.**

Having reviewed the findings of fact, conclusions of law, and recommendations set forth in the Magistrate Judge's Memorandum and Recommendation, as well as Claimants' objections, and all other relevant documents in the record, and having made a de novo disposition of the portions of the Magistrate Judge's Memorandum and Recommendation to which objections were specifically directed, the Court **OVERRULES** Claimants' objections and **ADOPTS** as its own the findings and conclusions of the Magistrate Judge. Accordingly, the Government's Motion for Finding of Fugitive Disentitlement (D.E. 95) is **GRANTED**, and Claimants' claim is **DISMISSED.** Additionally, Claimants' motions to dismiss (D.E. 5, 83) are **DENIED** as moot.

ORDERED this 25th day of January, 2016.

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE